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# MICHIGAN LAW ON RACE & LAW

## JOURNAL *of* LAW REFORM

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SPECIAL ISSUE

WINTER 2021

### **Toward a Race-Conscious Critique of Mental Health-Related Exclusionary Immigration Laws**

*Monika Batra Kashyap*

Legal reform scholarship can take many shapes: it can offer specific and concrete suggestions for reform, it can identify a legal issue in need of reform, or it can challenge the legal academy's perspective on an issue. For this Special Issue, the University of Michigan Journal of Law Reform is pleased to present Professor Monika Batra Kashyap's Article: Toward a Race-Conscious Critique of Mental Health-Related Exclusionary Immigrations Laws. Professor Batra Kashyap's important piece uses Dis/ability Critical Race Theory (DisCrit) to identify the racist and ableist underpinnings of our immigration laws and proposes that it should be used to inform future reform efforts.



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# TOWARD A RACE-CONSCIOUS CRITIQUE OF MENTAL HEALTH-RELATED EXCLUSIONARY IMMIGRATION LAWS

Monika Batra Kashyap★

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## ABSTRACT

*This Article employs the emergent analytical framework of Dis/ability Critical Race Theory (DisCrit) to offer a race-conscious critique of a set of immigration laws that have been left out of the story of race-based immigrant exclusion in the United States—namely, the laws that exclude immigrants based on mental health-related grounds. By centering the influence of the white supremacist, racist,*

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*and ableist ideologies of the eugenics movement in shaping mental health-related exclusionary immigration laws, this Article locates the roots of these restrictive laws in the desire to protect the purity and homogeneity of the white Anglo-Saxon race against the threat of racially inferior, undesirable, and unassimilable immigrants. Moreover, by using a DisCrit framework to critique today's mental health-related exclusionary law, INA § 212(a)(1)(A)(iii), this Article reveals how this law carries forward the white supremacist, racist, and ableist ideologies of eugenics into the present in order to shape ideas of citizenship and belonging. The ultimate goal of the Article is to broaden the conceptualization of race-based immigrant exclusion to encompass mental health-related immigrant exclusion, while demonstrating the utility of DisCrit as an exploratory analytical tool to examine the intersections of race and disability within immigration law.*

## INTRODUCTION

This Article offers a race-conscious critique of a set of immigration laws that have been left out of the story of race-based immigrant exclusion in the United States—namely, the laws that exclude immigrants based on mental health-related grounds. Scholars have successfully critiqued overtly racist exclusionary immigration laws such as the Chinese Exclusion Act of 1882<sup>1</sup> and the National Origins Act of 1924;<sup>2</sup> policies that supported the mass deportation of Mexican migrant workers such as Operation Wetback in the 1950s;<sup>3</sup> and more recently, discriminatory exclusionary policies aimed at Muslims such as the Trump era Muslim Bans.<sup>4</sup> Immigration and critical race scholars have rightly condemned these laws and policies for their racist and white supremacist motivations.<sup>5</sup> Moreover, certain facially “neutral” exclusionary

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1. Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943) (restricting the immigration of Chinese laborers).

2. Immigration Act of 1924, ch. 190, 43 Stat. 153, 159 (repealed 1952).

3. For descriptions of Operation Wetback, see generally Kelly Lytle Hernández, *The Crimes and Consequences of Illegal Immigration: A Cross-Border Examination of Operation Wetback, 1943 to 1954*, 37 W. HIST. Q. 421 (2006).

4. For a comprehensive explanation of the three iterations of Trump's Muslim Bans, see Shoba Sivaprasad Wadhia, *National Security, Immigration, and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475, 1483–88 (2018).

5. See, e.g., Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 22 (1998) (arguing that the Asian exclusion laws were motivated by a desire to “foster white supremacy by defending white civilization against an undesirable race”); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1118 (1998) (arguing that the racially motivated exclusionary immigration laws show that America “has consistently strived for Anglo-Saxon homogeneity and hegemony”); MAE

immigration laws such as those that exclude immigrants based on crime and poverty have also been subjected to robust race-conscious critique by immigration scholars.<sup>6</sup>

This Article will employ the emergent analytical framework of Dis/ability Critical Race Theory (DisCrit) in order to offer a race-conscious critique of immigration laws that exclude immigrants based on mental health-related grounds. By centering the influence of the white supremacist, racist, and ableist logics of the eugenics movement in shaping mental health-related exclusionary immigration laws, this Article locates the roots of these restrictive laws in the desire to protect the purity and homogeneity of the white Anglo-Saxon race against the threat of racially inferior, undesirable, and unassimilable races. Recognition of the white supremacist, racist, and ableist roots of mental health-related exclusionary immigration laws can deepen our understanding of how today's mental health-related exclusionary law, INA § 212(a)(1)(A)(iii), continues to reinforce white supremacist beliefs about race and ability. The ultimate goal of the Article is to broaden the conceptualization of

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M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 27–29 (2004) (arguing that the Immigration Act of 1924 evidenced the U.S. government's "conviction that the American nation was, and should remain, a white nation descended from Europe"); Gerald P. López, *Growing Up in Authoritarian 1950's East LA*, 66 UCLA L. REV. 1532, 1511 (2019) (referring to "Operation Wetback" as a racist and "white supremacist authoritarian practice"); Zainab Ramahi, *The Muslim Ban Cases: A Lost Opportunity for the Court and a Lesson for the Future*, 109 CALIF. L. REV. 557, 568, 573 (2020) (describing Trump's Muslim Bans as an example of "racist and Islamophobic lawmaking" and arguing that the bans should be exposed as an "appeal to the preservation of white supremacy through the legitimization of anti-Muslim hatred and conduct").

6. For scholarship that offers a race-based critique of crime-related immigrant exclusion, see César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1461–67 (2014), which describes the disparate racial impacts of the criminal justice system on modern federal immigration enforcement); Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 994 (2016), which describes the racially disparate impact of crime-based deportation on Latinx communities; and Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171, 194 (2018), which underscores the need to understand that racial animus played a significant role in the creation and development of crime-related immigrant exclusion. For scholarship that offers a race-based critique of poverty-related immigrant exclusion, see Johnson, *supra* note 5, at 1134, which notes that the public charge exclusion has a disproportionate effect on immigrants of color from developing nations; and Cori Alonso-Yoder, *Publicly Charged: A Critical Examination of Immigrant Public Benefit Restrictions*, 97 DENV. U. L. REV. 1, 33 (2020), which argues that the public charge exclusion must be understood "as a discriminatory, racially motivated policy."

race-based immigrant exclusion to encompass mental health-related immigrant exclusion.<sup>7</sup>

The Article proceeds as follows. Part I introduces the theoretical framework of DisCrit and argues that a DisCrit critique of mental health-related exclusionary immigration laws will expose how white supremacist beliefs about race and disability intersect to exclude, deport, and remove immigrants who are seeking to live in the United States. Part II exposes the influence of the white supremacist, racist, and ableist ideologies of the eugenics movement in shaping mental health-related exclusionary immigration laws. Part III critiques today's mental health-related exclusionary immigration law, INA § 212(a)(1)(A)(iii), for carrying forward eugenic ideologies by reinforcing white supremacist beliefs about race and ability. The Article concludes by encouraging immigration and critical race scholars to continue to explore the utility of DisCrit as an analytical tool to examine the intersections of race and disability in immigration law.

#### I. THE KEY TENETS OF DIS/ABILITY CRITICAL RACE THEORY

In their groundbreaking article, *Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability*, interdisciplinary education and disability studies scholars Annamma, Connor, and Ferri present a dynamic theoretical framework that simultaneously engages with disability studies and critical race theory in order to better understand how concepts of race and ability are intertwined.<sup>8</sup> Accordingly, DisCrit seeks to unmask and expose the normalizing processes of racism and ableism as they circulate in society.<sup>9</sup>

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7. This Article builds upon the work of disability historian Douglas C. Baynton. See generally DOUGLAS C. BAYNTON, *DEFECTIVES IN THE LAND: DISABILITY AND IMMIGRATION IN THE AGE OF EUGENICS* (2016) (presenting a historical analysis of immigration restriction that highlights the ways in which disability intersected with race, gender, and ethnicity within the eugenic movement's fear of the "defective").

8. See Subini Ancy Annamma, David J. Connor & Beth A. Ferri, *Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability*, 16 RACE ETHNICITY & EDUC. 1 (2013). The authors deliberately use the term "dis/ability" instead of "disability" in order to "call attention to ways in which the latter overwhelmingly signals a specific inability to perform culturally-defined expected tasks (such as learning or walking) that come to define the individual as primarily and generally 'unable' to navigate society." *Id.* at 24 n.1.

9. *Id.* at 6–7 ("Our goals, then, align with Delgado and Stefancic's desire to unmask and expose the normalizing processes of racism and ableism as they circulate in society."); see also RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 13 (2001) (noting that a hallmark of critical race theory is the belief that "racism is ordinary, normal, and embedded in society").

Moreover, DisCrit is built upon a deep awareness of “intersectionality” and understands how both race and ability are intertwined in terms of identity.<sup>10</sup> By incorporating a dual analysis of race and disability and exposing the ways in which they are both socially constructed and interdependent, DisCrit provides an exploratory analytical tool that helps render the links between perceptions of race and disability more visible.<sup>11</sup>

In their seminal 2013 article, Annamma, Connor, and Ferri propose the following foundational tenets of DisCrit:

1. DisCrit focuses on ways that the forces of racism and ableism circulate interdependently, often in neutralized and invisible ways, to uphold notions of normalcy.
2. DisCrit values multidimensional identities and troubles singular notions of identity such as race *or* dis/ability *or* class *or* gender *or* sexuality, and so on.
3. DisCrit emphasizes the social constructions of race and ability and yet recognizes the material and psychological impacts of being labeled as raced or dis/abled, which sets one outside of the western cultural norms.
4. DisCrit privileges voices of marginalized populations, traditionally not acknowledged within research.
5. DisCrit considers legal and historical aspects of dis/ability and race and how both have been used separately and together to deny the rights of some citizens.
6. DisCrit recognizes whiteness and Ability as Property and that gains for people labeled with dis/abilities have largely been made as the result of interest convergence of white, middle-class citizens.
7. DisCrit requires activism and supports all forms of resistance.<sup>12</sup>

DisCrit as a theoretical framework has been recognized by interdisciplinary scholars in the fields of disability rights and education

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10. Annamma et al., *supra* note 8, at 8 (“[W]e find Crenshaw’s work on intersectionality useful for theorizing the ways in which race and ability are likewise intertwined in terms of identity.”). See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1993).

11. Subini Ancy Annamma, David J. Connor & Beth A. Ferri, *Introduction: A Truncated Genealogy of DisCrit*, in DISCRIT: DISABILITY STUDIES AND CRITICAL RACE THEORY IN EDUCATION 1 (David J. Connor, Beth A. Ferri & Subini A. Annamma eds., 2016).

12. Annamma et al., *supra* note 8, at 11.



equity<sup>13</sup>—as well as by legal scholars interested in the intersections between race, gender, disability, and criminal justice reform.<sup>14</sup> This Article seeks to forge alliances between DisCrit and immigration law scholarship by employing DisCrit as an analytical tool to expose the ways in which white supremacist beliefs about race and ability collude within immigration law to exclude immigrants based on mental health-related grounds. This Article will rely upon key principles and tenets of DisCrit to offer a race-conscious critique of mental health-related exclusionary immigration laws, including INA § 212(a)(1)(A)(iii).

## II. THE EUGENICS MOVEMENT AND IMMIGRATION RESTRICTION

DisCrit considers the legal, ideological, and historical aspects of dis/ability and race and how both have been used separately and together to deny the rights of some citizens.<sup>15</sup> For example, DisCrit is grounded in the awareness that scientific racism and the pseudosciences of phrenology, craniology, and eugenics emerged to prove that people of color had less capacity for intelligence than white people—and that these pseudosciences were used to justify the slavery, segregation, unequal treatment, harassment, violence, and even murder of Black and brown bodies in the United States.<sup>16</sup> This Part of the Article will expose how the pseudoscience of eugenics—and its underlying white supremacist, racist, and ableist ideologies—was used to justify the creation of restrictive

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13. See Ann C. McGinley & Frank Rudy Cooper, *Intersectional Cohorts, Dis/Ability, and Class Actions*, 47 FORDHAM URB. L.J. 293, 295–96 n.6 (2020) (citing to Annamma, Connor, and Ferri’s work and groundbreaking use of the term “dis/ability”). McGinley and Cooper seek to contribute to the fields of “dis/ability studies and critical race literatures” by offering a theory of “intersectional cohorts” to explain why Black and Latinx inner-city students from Compton deserve to be certified as a class in a pending disabilities suit. *Id.* at 294; see also Steven L. Nelson, *Special Education, Overrepresentation, and End-Running Education Federalism: Theorizing Towards A Federally Protected Right to Education for Black Students*, 20 LOY. J. PUB. INT. L. 205, 215–19 (2019) (examining the racial roots of racial disproportionality in special education). Nelson cites to Annamma et al., *supra* note 8 and Annamma et al., *supra* note 11. Nelson, *supra*, at 215 n.49.

14. See Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 988–99 n. 83 (2019) (citing to Annamma et al., *supra* note 8 to support the claim that a multidimensional consciousness recognizes the compounding forms of oppression experienced by people with disabilities while incarcerated); see also Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year of 2044*, 94 N.Y.U. L. REV. 1, 23 n.125 (referring to Annamma et al., *supra* note 8 as an example of “newer movement” influenced by critical race theory).

15. See Annamma et al., *supra* note 8, at 14–16 (discussing DisCrit tenet #5).

16. *Id.* at 2, 14.

immigration laws in order to exclude certain immigrants from the United States.

The eugenics movement came to the United States from Europe in the late-nineteenth century and folded in comfortably within the larger U.S. scientific racism movement that had emerged in the mid-nineteenth century.<sup>17</sup> Scientific racism entailed the use of various pseudosciences to justify, project, and enact racist policies.<sup>18</sup> For example, the pseudosciences of phrenology and craniology—the study of skull shapes and sizes in order to deduce moral and psychological traits of an entire race<sup>19</sup>—were used to justify chattel slavery in America by providing “evidence” that Africans were biologically inferior to white people and that slavery thus “improved blacks ‘in body, mind, and morals.’”<sup>20</sup>

Scientific racism was heavily influenced by social Darwinism, which held that social progress required the gradual extermination of biologically inferior groups from the gene pool and that the elimination of non-white races was an inescapable evolutionary fact.<sup>21</sup> The term “eugenics” was coined by Charles Darwin’s cousin, Francis Galton, who believed that all races other than “Anglo-Saxon” were “lower races,” “brute[s],” and “savages.”<sup>22</sup> Galton promoted the “science” of eugenics as a program of controlled and selective breeding that was designed to give

17. See ROBERT WALD SUSSMAN, *THE MYTH OF RACE: THE TROUBLING PERSISTENCE OF AN UNSCIENTIFIC IDEA* (2014) (situating eugenics within the larger history of scientific racism); see also GEORGE M. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817–1914*, at 74 (1971) (dating scientific racism to the emergence of the “American School of Ethnology” in the 1840s and 1850s). See generally REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM* (1981) (providing a history of scientific racism in the United States).

18. Rutledge Dennis, *Social Darwinism, Scientific Racism, and the Metaphysics of Race*, 64 J. NEGRO EDUC. 243, 243 (1995).

19. See generally SAMUEL GEORGE MORTON, *CRANIA AMERICANA* (1839).

20. WILLIAM H. TUCKER, *THE SCIENCE AND POLITICS OF RACIAL RESEARCH* 14, 174–85 (1994) (quoting S. A. Cartwright, *Report on the Diseases and Physical Peculiarities of the Negro Race*, 7 NEW ORLEANS MED. & SURGICAL J. 691, 707–09 (1851)).

21. JOHN C. GREENE, *DARWIN AND THE MODERN WORLD VIEW* 85 (1963); see also WILLIAM BENJAMIN SMITH, *THE COLOR LINE: A BRIEF ON BEHALF OF THE UNBORN* 192 (1905) (“If [Blacks] were the highest form of human life . . . we might be concerned . . . [but] to the clear, cold eye of science, the plight of these backward peoples appears practically hopeless. They have neither part nor parcel in the future history of man.”).

22. See FRANCIS GALTON, *INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT* 24–25 n.1 (1883); Francis Galton, *Hereditary Talent and Character*, 12 MACMILLAN’S MAG. 157, 326 (1865), reprinted in *EUGENICS: THEN AND NOW* 14, 31 (Carl J. Bajema ed. 1976).

“the more suitable races or strains of blood a better chance of prevailing speedily over the less suitable than they otherwise would have had.”<sup>23</sup>

Interest in the scientific promotion of superior genetic traits and the concomitant inhibition of inferior genetic traits gave rise to a eugenics movement in the United States that was heavily influenced by doctors, psychiatrists, criminologists, and sociologists who “rose to meet the menace of creeping degeneracy and to warn the nation of the danger.”<sup>24</sup> The result was a eugenics movement—rooted in white supremacy, racism, and ableism—that was intent on promoting a “conscious program of social engineering mandated through law.”<sup>25</sup> These laws included forced sterilization laws,<sup>26</sup> anti-miscegenation laws,<sup>27</sup> and—the subject of this Article—restrictive immigration laws.<sup>28</sup>

A. *The Three Pillars of the Eugenics Movement:  
White Supremacy, Racism, and Ableism*

The eugenics movement in the United States was organized around three pillars: 1) the presumed superiority of the white Anglo-Saxon race; 2) the fear of racially inferior, unassimilable, undesirable immigrants; and 3) the fear of mental disability.<sup>29</sup> These interlocking sets of beliefs influenced the eugenics movement’s promotion of specific laws to

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23. See GALTON, *supra* note 22, at 24–25 n.1.

24. See Robert J. Cynkar, *Buck v. Bell: “Felt Necessities” v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1424, (1981).

25. See Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS L. REV. 421, 423 (1988).

26. See, e.g., Alexandra Minna Stern, *Eugenics, Sterilization, and Historical Memory in the United States*, 23 HISTÓRIA, CIÊNCIAS, SAÚDE-MANGUINHOS 195, 196 (2016); see also *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding the constitutionality of a Virginia law that provided for the forcible sterilization of the institutionalized mentally ill and intellectually disabled).

27. See, e.g., Martha Menchaca, *The Anti-Miscegenation History of the American Southwest, 1837 to 1970: Transforming Racial Ideology into Law*, 20 CULTURAL DYNAMICS 279 (2008).

28. See, e.g., Robert DeC. Ward, *National Eugenics in Relation to Immigration*, 192 N. AM. REV. 56, 66 (1910).

29. See generally BAYNTON, *supra* note 7; ALLAN CHASE, *THE LEGACY OF MALTHUS: THE SOCIAL COSTS OF THE NEW SCIENTIFIC RACISM* 2–6 (1977); MARK H. HALLER, *EUGENICS: HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT* 111 (1963); KENNETH M. LUDMERER, *GENETICS AND AMERICAN SOCIETY: A HISTORICAL APPRAISAL* 7, 19–20 (1972).

prevent inferior and defective people from infecting the white race with their undesirable genes.<sup>30</sup>

### 1. White Supremacy: The Presumed Superiority of the White Anglo-Saxon Race

The eugenics movement has been broadly criticized for its white supremacist ideology.<sup>31</sup> In her discussion of the relationship between the eugenics movement and white supremacy, critical race scholar Khiara Bridges exposes how each of the tactics of the eugenics movement—forced sterilization,<sup>32</sup> anti-miscegenation, and immigration restriction—were grounded in notions of the genetic superiority of the white Anglo-Saxon race.<sup>33</sup> Bridges explains that the eugenicists’ “obsession” with immigration restriction was rooted in their “overarching concern about improving the White race” and their belief that “non-White immigrants possessed undesirable traits and ought to be excluded from the nation.”<sup>34</sup>

The influence of American eugenicist Madison Grant’s 1916 book entitled *The Passing of the Great Race*<sup>35</sup> in shaping racially restrictive immigration legislation provides a poignant example of how white supremacist beliefs fueled the eugenicists’ “obsession” with immigration.

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30. Note, *Regulating Eugenics*, 121 HARV. L. REV. 1578, 1580 n.10 (2008) (citing ALLEN BUCHANAN, DAN W. BROCK, NORMAN DANIELS & DANIEL WIKLER, FROM CHANCE TO CHOICE: GENETICS AND JUSTICE 40 (2000)).

31. See, e.g., Khiara Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 829 (2020) (noting that eugenics was a “profoundly racist and white supremacist social philosophy, with its architects and exponents proposing that by racial fiat, white people had the highest-quality genes”); see also Randall Hansen & Desmond King, *Eugenic Ideas, Political Interests, and Policy Variance: Immigration and Sterilization Policy in Britain and the U.S.*, 53 WORLD POL. 237, 248 (2001) (noting eugenicists in the United States believed those of Nordic or Aryan descent were genetically superior).

32. See Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449, 463–64 (2019). It is important to note that because eugenics was about “protecting and purifying the Caucasian race,” it was white people—not people of color—who initially found themselves the targets of eugenic sterilization in the early twentieth century. *Id.* at 467. The coercive sterilization of non-white people proliferated significantly in the 1960s and afterwards. *Id.* at 471.

33. *Id.* at 449, 463.

34. *Id.* at 466. The author notes that for the eugenicists, “certain immigrant groups, like those hailing from the Scandinavian countries, had desirable genes; others, like those hailing from Greece, Italy, Ireland, and Eastern Europe—not to mention Asia—had terrible ones.” *Id.* at 463.

35. MADISON GRANT, *THE PASSING OF THE GREAT RACE* 100 (rev. ed. 1918).

In this book—which Adolf Hitler heralded as his “Bible”<sup>36</sup>—Grant attributed all of the key advances in Western civilization to the Nordic race, which he believed constituted a superior subspecies of humanity: “the white man par excellence” and the “master race.”<sup>37</sup> Grant contended that by allowing immigration by non-Nordics, “the whole tone of American life, social, moral and political, has been lowered and vulgarized by them.”<sup>38</sup> *The Passing of the Great Race* was invoked on the floor of the U.S. Senate to garner support for an infamous piece of immigration legislation that restricted immigration on the basis of national origin.<sup>39</sup> In support of the National Origins Act of 1924,<sup>40</sup> U.S. Senator and eugenicist Ellison DuRant Smith made the following statement:

I would like for the Members of the Senate to read that book just recently published by Madison Grant, *The Passing of a Great Race*. Thank God we have in America perhaps the largest percentage of any country in the world of the pure, unadulterated Anglo-Saxon stock; certainly the greatest of any nation in the Nordic breed. It is for the preservation of that splendid stock that has characterized us that I would make this not an asylum for the oppressed of all countries, but a country to assimilate and perfect that splendid type of manhood that has made America the foremost Nation in her progress and in her power.<sup>41</sup>

The National Origins Act of 1924 created a national origin quota system that imposed numerical restrictions on immigrants in order to maintain a white Anglo-Saxon nation.<sup>42</sup> Legal historian Mae Ngai argues that this racial quota system evidenced the U.S. government’s “conviction that the American nation was, and should remain, a White nation descended from Europe.”<sup>43</sup>

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36. See Paul Lombardo, “*The American Breed*”: Nazi Eugenics and the Origins of the Pioneer Fund, 65 ALB. L. REV. 743, 758–59 (2002) (noting that “[Grant’s] 1916 book *The Passing of the Great Race* won praise from Hitler as ‘his Bible’ ”).

37. *Id.* at 167, 214–15.

38. *Id.* at 89–90.

39. 65 CONG. REC. 5960, 5961 (1924) (statement of Sen. Ellison DuRant Smith in support of the National Origins Act of 1924).

40. Immigration Act of 1924, ch. 190, 43 Stat. 153 (repealed 1952). This Act is also known as the National Origins Act of 1924.

41. See 65 CONG. REC., *supra* note 39, at 5961.

42. See H.R. REP. NO. 68-176, pt. 2, at 3 (1924).

43. NGAI, *supra* note 5, at 27.

## 2. Racism: The Fear of Racially Inferior, Unassimilable, Undesirable Immigrants

When the eugenics movement arrived in the United States in the late-nineteenth century, its racist ideologies dovetailed with the virulent anti-Chinese racism that was sweeping the nation<sup>44</sup> and ultimately resulted in the Chinese Exclusion Act of 1882.<sup>45</sup> Historian Erika Lee argues that one of the most significant consequences of the Chinese exclusion era was that it established “a powerful framework, model, and set of tools to be used to understand and further racialize other threatening, excludable, and undesirable” immigrants.<sup>46</sup> Lee argues that the framework of Chinese restriction and exclusion was repeatedly recycled and refashioned to apply to succeeding groups of immigrants—including other Asian, southern and eastern European, and Mexican immigrants.<sup>47</sup> Lee identifies the anti-Chinese framework as one in which immigrants were deemed racially inferior, culturally unassimilable, and a threat to the Anglo-Saxon nation.<sup>48</sup>

The formation of the eugenicist-led Immigration Restriction League (IRL) in 1894 provides a fitting example of how the eugenics movement employed the anti-Chinese framework to “racialize other threatening, excludable, and undesirable” immigrants.<sup>49</sup> The mission of the IRL was to advocate for the “exclusion of elements undesirable for citizenship or injurious to [the] national character.”<sup>50</sup> The IRL’s leaders declared that the “new immigrants” from southern and eastern Europe compared unfavorably with the “old immigrants” from northwestern Europe—arguing, among other allegations, that the “new immigrants” were genetically and racially inferior, were disproportionately disposed to insanity, and that they were unfit to participate in American political

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44. See generally Erika Lee, *The Chinese Exclusion Example: Race, Immigration, and American Gatekeeping, 1882-1924*, 21 J. AM. ETHNIC HIST., Spring 2002, at 36 (discussing in detail the anti-Chinese movement of the late nineteenth century that led to the passage of the Chinese Exclusion Act of 1882).

45. See Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943).

46. Lee, *supra* note 44, at 42.

47. *Id.* at 43–44; see also Sherali Munshi, *Immigration, Imperialism, and the Legacies of Indian Exclusion*, 28 YALE L.J. & HUMAN. 51, 70–72 (2016) (discussing legislative attempts to pass a “Hindu Exclusion Act” to exclude immigrants from India that was modeled after the Chinese Exclusion Act).

48. Lee, *supra* note 44, at 47.

49. See Jared Goldstein, *Unfit for the Constitution: Nativism and the Constitution, from the Founding Fathers to Donald Trump*, 20 U. PA. J. CONST. L. 489, 514–20 (2018) (discussing the creation and mission of the Immigration Restriction League).

50. *Id.* at 514 (quoting IMMIGR. RESTRICTION LEAGUE, *Constitution of the Immigration Restriction League* 1 (c. 1890), [https://iiif.lib.harvard.edu/manifests/view/drs:5233215\\$1i](https://iiif.lib.harvard.edu/manifests/view/drs:5233215$1i)).

life.<sup>51</sup> Accordingly, the IRL focused its efforts advocating for the adoption of a literacy test in order to safeguard the superior white race by restricting the immigration of racially inferior and unassimilable immigrants.<sup>52</sup> The IRL believed that a literacy test would help exclude immigrants “who are degraded, ignorant alike of their own language and of any occupation, incapable of appreciating [American] institutions and standards of living, and very difficult of assimilation.”<sup>53</sup>

### 3. Ableism: The Fear of Mental Disability

The eugenics movement has also been criticized for its ableist ideologies. Legal and public health scholar Osagie Obasogie acknowledges that eugenics promoted the idea that “affluent able-bodied whites” were in danger of having their “ostensibly superior genes weakened” by the inferior and socially undesirable traits found in disabled people.<sup>54</sup> Lombardo further explains that eugenics was “notorious for its pointed stigmatization of people with disabilities—particularly those with mental disorders.”<sup>55</sup> The eugenicists were particularly concerned with mental disability, which they believed was an inherited recessive trait linked to morals, virtue, and social adequacy.<sup>56</sup> As a result, terms like “feeble-minded,” “imbeciles,” “idiots,” and “morons” started to develop technical meanings that were expanded upon and quantified with the development of the Stanford-Binet intelligence test.<sup>57</sup>

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51. *Id.* at 514–20.

52. See *The Case for the Literacy Test*, UNPOPULAR REV., Jan.–Mar. 1916, reprinted in 66 PUBLICATIONS OF THE IMMIGRATION RESTRICTION LEAGUE 7, 12–14, 17 (arguing for a literacy test that would admit only those immigrants who could assimilate, which is “necessary for the preservation of the high ideals of the United States.”); see also *infra* note 82 and accompanying text (discussing the adoption of the literacy test with the Immigration Act of 1917).

53. *The Present Italian Influx, Its Striking Illiteracy*, in 14 PUBLICATIONS OF THE IMMIGRATION RESTRICTION LEAGUE (c. 1896).

54. See Osagie K. Obasogie, *More Than Love: Eugenics and the Future of Loving v. Virginia*, 86 Fordham L. Rev. 2795, 2797 (2018); see also WILLIE V. BRYAN, *THE SOCIAL PERSPECTIVES AND POLITICAL HISTORY OF DISABILITIES AND REHABILITATION IN THE UNITED STATES* 71–72 (2010) (discussing how the construction of different abilities as a problem requiring cure or treatment is associated with eugenics).

55. Paul A. Lombardo, *Disability, Eugenics, and the Culture Wars*, 2 ST. LOUIS U. J. HEALTH L. & POL’Y 57 (2008).

56. See Cynkar, *supra* note 24, at 1422.

57. See ALAN M. KRAUT, *SILENT TRAVELERS: GERMS, GENES, AND THE IMMIGRANT MENACE* 70–73 (1994) (discussing the introduction of the French Binet-Simon IQ test to the United States in 1908 by New Jersey psychologist and eugenicist Henry H. Goddard who used the test to “rank” the “feeble-minded” into varying degrees of mental

In particular, the eugenicists believed “imbecility” to be “the most insidious and the most aggressive of degenerative forces, attacking alike the physical, mental and moral nature, enfeebling the judgment and will, while exaggerating the sexual impulses.”<sup>58</sup> Similarly, “feeble-mindedness” was not only one of the “key focal points of eugenic contempt,”<sup>59</sup> it was perhaps the greatest target of the eugenics movement.<sup>60</sup> Accordingly, the eugenics movement strategized its efforts to protect the nation from external threats of the mentally disabled by lobbying for laws restricting immigration based on mental health-related grounds.

B. *The Impact of the Eugenics Movement  
on Mental Health-Related Immigrant Exclusion*

The white supremacist, racist, and ableist ideologies of the eugenics movement had a significant impact on several immigration laws that excluded immigrants based on mental health-related grounds. The first federal law to exclude immigrants based on mental health-related grounds was the Immigration Act of 1882, which excluded immigrants who were deemed to be “lunatics and idiots.”<sup>61</sup> The 1882 Act dovetailed with the arrival of the eugenics movement in the United States.<sup>62</sup> As the eugenics movement began to spread, physicians and psychiatrists complained about immigrants with mental illness and blamed their “different customs and intemperance” for making them resistant to “moral treatment.”<sup>63</sup> They blamed the misfortunes of immigrant patients on their defective heredity and urged for Congress “to do more than the 1882 law to exclude

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incompetence: “idiots” (pre-verbal), “imbeciles” (illiterate), and “morons” (high-functioning)).

58. See MARTIN W. BARR, *MENTAL DEFECTIVES: THEIR HISTORY, TREATMENT, AND TRAINING* 102 (1904).

59. Lombardo, *supra* note 55, at 57.

60. See ADAM COHEN, *IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK* 6 (2016) (noting that “the greatest target” of the eugenicists was the “feeble-minded”).

61. Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214 (repealed 1966). The Immigration Act of 1882 also coincided with the passage of the Chinese Exclusion Act of 1882, which was enacted just three months earlier on May 6, 1882.

62. Prior to the arrival of the eugenics movement in the United States, individual states enacted laws that restricted immigrants based on mental-health related grounds. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1885)*, 93 COLUM. L. REV. 1833, 1847–48 (1993). These early laws were used to screen out immigrants who were feared would impede economic expansion and create a financial burden on the nation state. See *id.*

63. IAN ROBERT DOWBIGGIN, *KEEPING AMERICA SANE: PSYCHIATRY AND EUGENICS IN THE UNITED STATES AND CANADA, 1880–1940*, at 23, 194 (2003).



‘defective classes’ of newcomers.”<sup>64</sup> In response, Congress passed the Immigration Act of 1891<sup>65</sup> whose stated purpose was “to separate the desirable from the undesirable immigrants, and to permit only those to land on our shores who have certain physical and moral qualities.”<sup>66</sup> The 1891 Act added “insane persons” to the health-related grounds and mandated that arriving immigrants be subjected to a medical examination by a “civil surgeon” of the Marine Hospital Service.<sup>67</sup>

As immigration from southern and eastern Europe began to rise, eugenicists “promoted an elaborate set of racial ideas that marked southern and eastern Europeans as different and inferior, and a threat to the nation.”<sup>68</sup> For example, in 1896, Senator Henry Cabot Lodge introduced a bill that was “intended to amend the existing law so as to restrict still further immigration to the United States.”<sup>69</sup> In support of his bill, Lodge argued that new immigrants from southern and eastern Europe not only hurt the wages of “real Americans,” but they also threatened the quality of the “higher” American race.<sup>70</sup> Lodge argued that the white Anglo Saxon race gave American people the qualities of independence, initiative, and a strong sense of morality.<sup>71</sup> He considered the new immigrants from Portugal, Italy, Czechoslovakia, Poland, Ukraine, Russia, Hungary, Serbia, Bulgaria, Romania, Bosnia, Croatia, Georgia, Greece, Armenia, and Syria to be “inferior races” and warned the Senate that “if a lower race mixes with a higher in sufficient numbers, history teaches us that the lower race will prevail,” and that “the lowering of a great race means not only its own decline, but the decline of civilization.”<sup>72</sup>

A few years later, Congress enacted the Immigration Act of 1903, which added new restrictive mental health-related grounds for exclusion, including epileptics, persons who “have been insane within five years previous,” and persons who “have had two or more attacks of insanity at

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64. *Id.*

65. Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084.

66. SELECT COMM. ON IMMIGR. & NATURALIZATION, IMMIGRATION INVESTIGATION, H.R. REP. NO. 3807, at 2 (1891).

67. Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084. Congress created the Public Health Service in 1798 as the U.S. Marine Hospital Service under the jurisdiction of the Treasury Department, where it remained until 1939. Medical officers provided medical care to merchant marines. Congress renamed the service several times. Not until 1912 was it known as the Public Health Service. *See generally* RALPH CHESTER WILLIAMS, M.D., THE UNITED STATES PUBLIC HEALTH SERVICE, 1798–1950 (1951).

68. Lee, *supra* note 44, at 47.

69. 28 CONG. REC. 2817 (Mar. 16, 1896) (statement of Sen. Lodge).

70. *See id.* at 2819–20.

71. *Id.*

72. *Id.*

any time previously.”<sup>73</sup> The 1903 Act also expanded medical examinations to include physical *and* mental examination of all arriving immigrants.<sup>74</sup> As a result of the 1903 Act, any immigrant who had a suspected mental defect or who showed signs of mental disease was forced to endure varying iterations of controversial psychological tests that were used to determine mental fitness.<sup>75</sup>

For the eugenicists, however, the 1903 Act did not go far enough in making it easier to exclude mentally disabled immigrants. In 1906, Kentucky Senator James McCreary introduced a bill<sup>76</sup> to include two specific categories and hallmarks of the eugenics movement: “imbeciles and feeble-minded persons.”<sup>77</sup> McCreary acknowledged that these two classes “have never before been in any of our immigration laws,” but argued that they should “certainly be debarred” because imbeciles and feeble-minded persons are “as undesirable” as “the idiotic” and “it is as injurious and as improper to add to the American race the children of feeble-minded parents as of idiotic parents.”<sup>78</sup> The Senate bill passed, and the Immigration Act of 1907 included in its list of categories of “defective persons” the new eugenics-inspired mental health-related categories of “imbeciles [and] feeble-minded persons.”<sup>79</sup>

Then, not long after Madison Grant published his 1916 book *The Passing of the Great Race*,<sup>80</sup> Congress enacted the Immigration Act of 1917,<sup>81</sup> which represented the most comprehensive embrace of the white supremacist, racist, and ableist ideologies of the eugenics movement. First, the 1917 Act was known as the “Literacy Act” because it instituted a literacy test in order to maintain white Anglo-Saxon racial superiority by “eliminat[ing] the lower classes of immigration from the countries that are not of Teutonic and Celtic origin.”<sup>82</sup> Second, the 1917 Act was also

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73. Alien Immigration Act, Pub. L. No. 162, § 2, 38 Stat. 1213 (1903).

74. *Id.* at § 17.

75. KRAUT, *supra* note 57, at 73 (discussing the various attempts by physicians between 1910–1916 to develop psychological testing diagnostic instruments to determine the mental fitness of immigrants including a “cube test” in which the immigrant was asked to imitate the sequence in which the examiner had touched four or five cubes).

76. 40 CONG. REC. 7222–27 (1906) (speech by Sen. James McCreary on S.4403).

77. *Id.* at 7225; *see also supra* notes 55–57 and accompanying text (describing “feeble-mindedness” and “imbecility” as key targets of the eugenicists’ contempt).

78. 40 CONG. REC., *supra* note 76, at 7225.

79. Immigration Act of Feb. 20, 1907, Pub. L. No. 96, § 2, 34 Stat. 899 (specifically labelling the category of inadmissibility grounds set forth with the term “defective persons.”).

80. *See supra* notes 35–42 and accompanying text (discussing the influence of Grant’s book, *The Passing of the Great Race*, on racially restrictive immigration legislation).

81. Immigration Act of 1917, Pub. L. No. 301, 39 Stat. 874.

82. 40 CONG. REC., *supra* note 76, at 9155 (statement of Rep. Oscar Underwood).

known as the “Asiatic Barred Zone Act” because it excluded immigrants from most of Asia and countries adjacent to Asia.<sup>83</sup> As immigration scholar Sherally Munshi explains, the 1917 Act “recast[] exclusion in geographic terms,”<sup>84</sup> and was in fact rooted in the racist desire to exclude Indian immigrants who were “universally regarded as the least desirable race of immigrants thus far admitted to the United States.”<sup>85</sup> And third, the 1917 Act added new exclusionary categories that reeked of ableism including “illiterates”<sup>86</sup> and “persons of constitutional psychopathic inferiority.”<sup>87</sup>

The exclusionary grounds enumerated in the Immigration Act of 1917 were adopted into the Immigration and Nationality Act of 1952 (INA); while the INA has been amended many times since 1952, it continues to serve as the primary foundation for immigration law today.<sup>88</sup>

### III. A DISCRIT ANALYSIS OF INA §212(A)(1)(A)(III)

In 1990, the INA was amended through the Immigration Act of 1990 by replacing all preexisting mental health-related exclusionary

83. See Munshi, *supra* note 47, at 57, 77, 77 n.131 (discussing the congressionally invented “Asiatic Barred Zone” and noting that barred countries included India, Burma, Siam, the Malay States, Arabia, Afghanistan, part of Russia, and most of the Polynesian Islands).

84. *Id.* at 78.

85. *Id.* at 70 (quoting the 1911 Dillingham Commission report that was commissioned by Congress to study the impact of immigration in U.S. society. See U.S. IMMIGR. COMM’N, IMMIGRANTS IN INDUSTRIES, S. DOC. NO. 61-633, at 349 (2d Sess. 1911)).

86. *Cf.* Goldstein, *supra* note 49, at 515 n.136 (noting the IRL’s disdain for the “illiterate and depraved” new immigrants from southern and eastern Europe). For a discussion of the eugenic movement’s desire to prevent, through forced sterilization, the reproduction of “unfit” persons including “illiterates,” see ANGELA Y. DAVIS, WOMEN, RACE AND CLASS 214 (1983).

87. Immigration Act of 1917 Pub. L. No. 301, § 3, 39 Stat. 874. The “persons of constitutional psychopathic inferiority” ground served as the basis for the exclusion of immigrants based on “homosexuality” for the next seventy years. See, e.g., *In re LaRochelle*, 11 I. & N. Dec. 436 (B.I.A. 1965) (holding that homosexuality comes within meaning of constitutional psychopathic inferiority). It was not until 1990 that the “persons of constitutional psychopathic inferiority” provision was repealed with the passage of the Immigration Act of 1990. See generally Robert Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration*, 29 Harv. C.R.-C.L. L. Rev. 439 (1994).

88. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, amended by Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911; 8 U.S.C. § 1101-1504 (2016); see also S. REP. NO. 80-1515, at 335 (1950) (“The excludable classes were assembled in the act of February 5, 1917, which is presently in effect” (citation omitted)).

grounds with one two-part mental health-related exclusionary ground—namely, INA § 212(a)(1)(A)(iii).<sup>89</sup> Since 1990, the INA § 212(a)(1)(A)(iii) excludes—or renders inadmissible<sup>90</sup>—any immigrant who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services):

- (I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others; or
- (II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior.<sup>91</sup>

All immigrants seeking to live in the United States are subject to INA § 212(a)(1)(A)(iii), including those immigrants who are already in the United States without lawful immigration status and those who are applying for a visa or for legal permanent residence.<sup>92</sup> If an immigrant is deemed inadmissible, she will be excluded or subjected to deportation.<sup>93</sup>

INA § 212(a)(1)(A)(iii) was intended to represent a “more enlightened and flexible alternative”<sup>94</sup> to the prior “outmoded grounds”<sup>95</sup> of exclusion based on mental-health by creating a “general exclusion based on a mental or physical disorder which could endanger the alien or

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89. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

90. The 1996 Illegal Immigration Reform and Immigrant Responsibility Act replaced the term “exclusion grounds” with the term “inadmissibility grounds.” See THOMAS ALEXANDER ALEINKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 428 (2003).

91. Section 212(a)(1)(A)(iii) of the Immigration Nationality Act (INA) is in effect today. 8 U.S.C. § 1182(a)(1)(A)(iii).

92. 8 U.S.C. § 1182(a). Even some immigrants who are not, at the moment of application, seeking to live permanently in the United States are subject to these grounds, including applicants for certain VAWA-related provisions such as applicants for U-Visas and T-Visas.

93. INA section 237(a) sets out the categories of deportable immigrants including those who are deemed inadmissible. See U.S.C. § 1227(a)(1)(A).

94. H.R. Rep. No. 101-723, at 6732 (1990).

95. 136 CONG. REC. H35,416 (daily ed. Oct. 26, 1990). Specifically, INA § 212(a)(1)(A)(iii) replaced the prior mental health-related grounds that excluded immigrants who were deemed to be “mentally retarded,” those deemed “insane,” and those found to have had “one or more attacks of insanity.” Compare Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163, *amended by* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911, *with* 8 U.S.C. §§ 1101–1504.

others.”<sup>96</sup> This Part of the Article will use a DisCrit approach to show that instead of representing an “enlightened alternative,” INA § 212(a)(1)(A)(iii) continues to uphold the white supremacist, racist, and ableist pillars of the eugenics movement. This Part will expose how the enforcement of INA § 212(a)(1)(A)(iii) continues to reinforce white supremacist beliefs about race, ability, and notions of normalcy in ways that shape ideas about citizenship and belonging.<sup>97</sup>

#### A. Dismantling the Statutory Language of INA § 212(a)(1)(A)(iii)

INA § 212(a)(1)(A)(iii) is enforced through a mandatory medical exam conducted by a designated civil surgeon<sup>98</sup> pursuant to instructions issued by the Centers for Disease Control and Prevention (CDC) entitled *CDC Technical Instructions for Physical or Mental Disorders with Associated Harmful Behaviors and Substance-Related Disorders*.<sup>99</sup> The CDC technical instructions provide guidance in defining key statutory terms governing mental health inadmissibility determinations. Importantly, the CDC instructions give guidance in determining what should be considered a “mental disorder,” what constitutes “harmful behavior,” and whether such behavior is “likely to recur.”<sup>100</sup>

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96. 136 CONG. REC. H 13,238 (daily ed., Oct. 26, 1990) (joint explanatory statement of the Comm. of Conf.).

97. See Annamma et al., *supra* note 8, at 16 (discussing DisCrit Tenet #5 and the need to acknowledge how race and ability have historically—and continue to—“shape ideas about citizenship and belonging”).

98. USCIS designates eligible physicians as “civil surgeons” to perform medical examinations for immigration benefit applicants in the United States and assess whether applicants have any health conditions that could result in exclusion from the United States. See 8 U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL, pt. C, ch. 1 (Jan. 2020). Civil Surgeons should be distinguished from “panel physicians” who are designated by the Department of State and provide immigration medical examinations required as part of an applicant’s visa processing at a U.S. Embassy or consulate abroad. See 42 C.F.R. § 34.2(o) (2019); 22 C.F.R. § 42.66 (2019); 9 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 302.2–3(E)(2016).

99. See CTR. FOR DISEASE CONTROL & PREVENTION, TECHNICAL INSTRUCTIONS FOR PHYSICAL OR MENTAL DISORDERS WITH ASSOCIATED HARMFUL BEHAVIORS AND SUBSTANCE-RELATED DISORDERS (Aug. 25, 2017), <https://www.cdc.gov/immigrantrefugeehealth/exams/ti/civil/mental-civil-technical-instructions.html> [<https://perma.cc/C4XZ-L6CY>] [hereinafter CDC INSTRUCTIONS].

100. *Id.*

## 1. “Mental Disorder”

The CDC technical instructions define “mental disorders” as “health conditions that are characterized by alterations in thinking, mood, or behavior (or some combination thereof).”<sup>101</sup> A DisCrit analysis of definitions of “mental disorders” requires the understanding that race and disability are social constructions rooted in white supremacist beliefs about race and ability.<sup>102</sup> By relying wholesale on diagnoses of mental disorders to determine an immigrant’s exclusion from the nation, INA § 212(a)(1)(A)(iii) unapologetically disregards the ways in which definitions of mental disorders have been—and continue to be—socially constructed and rooted in white supremacist notions of normalcy.<sup>103</sup>

For example, in 1850, a new mental illness called “drapetomania” was scientifically established by Louisiana physician and phrenologist Samuel Cartwright.<sup>104</sup> Seeking a diagnosis to explain what caused slaves to flee captivity, Cartwright defined drapetomania as “the disease causing Negroes to run away.”<sup>105</sup> Cartwright warned that “sulkiness” and “[dissatisfaction] without cause” represented threatening behavioral signs that a slave was about to flee.<sup>106</sup> To prove this new disease, Cartwright called upon European doctors who “demonstrated by dissection” that Africans had darker blood and “cloudier” membranes and tendons than Caucasians, and therefore their desire to run away was not willful or understandable, but instead the result of a mental disease.<sup>107</sup> Cartwright claimed that slaves could be treated for this illness by “whipping the devil out of them.”<sup>108</sup>

101. *Id.* The CDC Instructions also refer to the DSM-V as an “authoritative source on the classification of mental disorders.” *Id.*; see also *infra* notes 130–40 and accompanying text (setting forth a DisCrit critique of the DSM-V).

102. See Annamma et al., *supra* note 8, at 20 (discussing how DisCrit attempts to address ways in which race and dis/ability are socially constructed and maintained by systems of oppression).

103. See *id.* at 12–13 (discussing DisCrit Tenet #3 and noting that “race and ability are socially constructed in tandem”). In addition to mental disorders, definitions of physical disorders have also been deeply racist at their inception. Take for example the discovery of Down’s Syndrome which was originally called “Mongolian idiocy” or “Mongolism”—the anthropological label used to classify the Chinese race—because it was a “lower-stage of human life characteristic of forms of lower races.” See STEPHEN JAY GOULD, *THE PANDA’S THUMB: MORE REFLECTIONS IN NATURAL HISTORY* 164–65 (1980).

104. See Samuel A. Cartwright, *Diseases and Peculiarities of the Negro Race*, XI DEBOW’S REV. 331 (1851).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

While the diagnosis of drapetomania may seem to be an example of an “outmoded” mental disorder, psychiatrist and sociology scholar Jonathan Metzl exposes how in the 1960s, the field of psychiatry transformed the mental disorder of schizophrenia from “an illness that afflicted nonviolent, white, petty criminals” to “a disorder of racialized aggression” that was disproportionately applied to Black men who were then committed to insane asylums.<sup>109</sup> Metzl describes the disproportionate diagnosis of schizophrenia applied to Black male civil rights protesters in the 1960s as an example of how psychiatric definitions of insanity define threats to the “racial status quo” as a form of madness “overwhelmingly located in the minds and bodies of [B]lack men.”<sup>110</sup>

Moreover, Metzl argues that psychiatric definitions of insanity “continue to police racial hierarchies, tensions, and unspoken codes in addition to separating normal from abnormal behavior.”<sup>111</sup> He cites to a 2004 study conducted by the U.S. Department of Veteran Affairs that found that, although schizophrenia has been shown to affect all ethnic groups at the same rate, Black people were four times as likely to be diagnosed with the disorder as white people.<sup>112</sup> The researchers of the 2004 study attribute such disproportionality to the fact that “diagnostic measures developed primarily with white patients in mind do not automatically apply to other groups,” and that cultural differences between patients and doctors can lead to “[misinterpretations] of expression[s] of . . . psychiatric symptom[s].”<sup>113</sup> Metzl also argues that anxieties about racial difference continue to shape diagnostic criteria, health care policies, and medical attitudes about mentally ill persons.<sup>114</sup> Not surprisingly, Black and brown people continue to be disproportionately diagnosed with psychotic disorders.<sup>115</sup>

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109. Christopher Lane, *How Schizophrenia Became a Black Disease: An Interview with Jonathan Metzl*, PSYCH. TODAY (May 5, 2010), <https://www.psychologytoday.com/us/blog/side-effects/201005/how-schizophrenia-became-black-disease-interview-jonathan-metzl> [https://perma.cc/7SXM-G4RX].

110. See JONATHAN M. METZL, *THE PROTEST PSYCHOSIS: HOW SCHIZOPHRENIA BECAME A BLACK DISEASE*, at ix (2010).

111. *Id.*

112. See Shankar Vendantum, *Racial Disparities Found in Pinpointing Mental Illness*, WASH. POST (June 28, 2005), <https://www.washingtonpost.com/archive/politics/2005/06/28/racial-disparities-found-in-pinpointing-mental-illness/938a6081-b46c-4b7c-a4c9-4fd831670ec9> [https://perma.cc/U5UQ-6767] (discussing a 2004 study conducted by the U.S. Department of Veterans Affairs led by John Zeber and published in the journal *Social Psychiatry and Psychiatric Epidemiology*).

113. *Id.* (quoting John Zeber, a researcher at the Department of Veterans Affairs' Health Services Research and Development Service).

114. METZL, *supra* note 110.

115. Robert C. Schwartz & David M. Blankenship, *Racial Disparities in Psychotic Disorder Diagnosis: A Review of Empirical Literature*, 4 WORLD J. PSYCHIATRY, 133–140

Therefore, when viewed through a DisCrit lens, INA § 212(a)(1)(A)(iii)—by uncritically rendering mental disorder diagnoses determinative of an immigrant’s inadmissibility—fails to recognize how definitions of mental disorders have been (and continue to be) socially constructed and rooted in white supremacist beliefs about race, ability, and notions of normalcy.

## 2. “Harmful Behavior” and “Likely to Recur”

The CDC technical instructions define “harmful behavior” as an action associated with a mental or physical disorder that causes: 1) serious psychological or physical injury to self or to others; 2) a serious threat to “health or safety”; or 3) major property damage.<sup>116</sup> DisCrit recognizes how various “markers of difference from the norm” such as race, culture, sexuality, language, immigration status, gender, and class contribute to and inform the ways in which disability is stigmatized.<sup>117</sup> Therefore, in the immigrant context, disability is stigmatized in ways that trigger specific stereotypical associations with weakness that are based on white supremacists beliefs about race and ability and rooted in pseudoscience.<sup>118</sup> These associations result in the fear of immigrants as “unhealthy, unable to adequately compete in work and war, with their reproductive potential questioned, feared or even forcibly managed.”<sup>119</sup>

A DisCrit critique of INA § 212(a)(1)(A)(iii)—and the CDC instructions—reveals that what is considered to be “threatening” or “harmful” behavior is not only informed by white supremacist beliefs about race and ability, but also by the resultant myths and fears about

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(2014) (finding “a clear and pervasive pattern” wherein Blacks and Latinos were disproportionately diagnosed with psychotic disorders on average approximately three times higher compared to white people); *see also* Annamma et al., *supra* note 8, at 2 (noting that students of color are disproportionately represented in special education classes in the categories of learning disability, intellectual disability, and behavior disorders—categories that “are the most problematic in terms of diagnosis because they rely on the subjective judgment of school personnel rather than biological facts”).

116. CDC INSTRUCTIONS, *supra* note 99.

117. Annamma et al., *supra* note 8, at 12 (discussing DisCrit Tenet #2).

118. *Id.* at 14–16.

119. *Id.* at 16; *see. e.g.*, Jacob Soboroff, Julia Ainsley & Daniella Silva, *Lawyers Allege Abuse of Migrant Women by Gynecologist for Georgia ICE Detention Center*, NBC NEWS (Sept. 15, 2020), <https://www.nbcnews.com/news/latino/nurse-questions-medical-care-operations-detainees-immigration-jail-georgia-n1240110> [https://perma.cc/ZQ7E-T5BN] (discussing lawsuit filed on behalf of detained immigrant women who were unknowingly subjected to unwanted hysterectomies).



immigrants as unhealthy and dangerous.<sup>120</sup> Mental disability law scholar and expert Michael Perlin defines “sanism” as a bias against individuals with mental disabilities based on myths about mental illness that are conflated with assumptions about race, gender, and ethnicity<sup>121</sup>—and often grounded in “eugenic and cultural pseudoscience.”<sup>122</sup> Perlin identifies several “sanist myths” that dominate social discourse such as:

1. Mentally ill individuals are “different,” and “less than human.”<sup>123</sup>
2. Mentally ill individuals are “erratic, deviant, morally weak, sexually uncontrollable, emotionally unstable, superstitious, lazy, ignorant, and demonstrate a primitive morality.”<sup>124</sup>
3. Mentally ill individuals are dangerous and frightening, and their dangerousness is easily and accurately identified by experts.<sup>125</sup>
4. Mentally ill individuals should be excluded from society and institutionalized because their presence “threatens the economic and social stability of residential communities.”<sup>126</sup>

By giving full discretionary power to the civil surgeons to “identify any harmful behavior” associated with a mental disorder and to determine what constitutes a “serious threat to health and safety,” the CDC instructions open the door for white supremacist assumptions and myths about people with mental disabilities to shape determinations that exclude immigrants based on mental disability.

Moreover, the CDC technical instructions provide guidance to civil surgeons when determining whether the deemed harmful behavior is “likely to recur.”<sup>127</sup> The instructions suggest that some potentially relevant factors could include whether the underlying physical or mental disorder is in remission or is “reliably controlled by medication or other effective treatment” or whether it has been twelve months since

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120. See Annamma et al., *supra* note 8, at 7 (noting that DisCrit recognizes that “ability and dis/ability are perceived and created based on ideologies of race and located within social and institutional structures as well as personal attitudes”).

121. See Michael L. Perlin, *On “Sanism,”* 46 SMU L. REV. 373, 374–75 (1992) (defining sanism as “an irrational prejudice . . . of the same quality and character of other prevailing prejudices such as racism, sexism, heterosexism and ethnic bigotry”).

122. *Id.* at 390.

123. *Id.* at 393.

124. *Id.* at 394.

125. *Id.*

126. *Id.* at 395.

127. CDC INSTRUCTIONS, *supra* note 99.

the harmful behavior occurred.<sup>128</sup> However, as DisCrit helps to illuminate, these instructions neglect to include the way in which white supremacist beliefs about race and ability and pseudoscience-based myths about immigrants factor into the determination of “likely to recur.”<sup>129</sup> Instead, civil surgeons are given wide discretion to predict future harmful behavior, which results in the exclusion, deportation, and removal of immigrants based on mental health grounds.

### B. Dismantling “Objective” Assessment Tools: The “DSM”

The CDC technical instructions require that all medical examiners use the current version of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) published by the American Psychiatric Association<sup>130</sup> when assessing whether an immigrant is inadmissible based on mental health.<sup>131</sup> The DSM has been the subject of much controversy and critique.<sup>132</sup> It has been critiqued for resulting in false diagnoses, for being overly influenced by the pharmaceutical industry, for the lack of transparency in how the DSM committees conduct research and collect data, for resulting in overdiagnoses and misdiagnoses based on its classification system, and for its susceptibility for overuse and misuse by the legal system.<sup>133</sup> DisCrit understands that white supremacist notions of race and disability have been identified and cemented through purportedly “objective” clinical assessment practices, and that these

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128. *Id.*

129. See Annamma et al., *supra* note 8, at 7 (noting that Black students are 67% “more likely than White students with emotional and behavioral problems” to be removed from school on the grounds of “dangerousness”); ERICA MEINERS, RIGHT TO BE HOSTILE: SCHOOLS, PRISONS, AND THE MAKING OF PUBLIC ENEMIES 38 (2007).

130. The fifth edition of DSM (DSM-5) is the standard reference manual currently used for the diagnosis of recognized mental illnesses in the United States. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

131. See CDC INSTRUCTIONS, *supra* note 99.

132. See, e.g., GARY GREENBERG, THE BOOK OF WOE: THE DSM AND THE UNMAKING OF PSYCHIATRY (2013) (highlighting controversial issues raised by the DSM-5 including issues involving Gender Identity Disorder, Asperger’s Syndrome, and post-bereavement depression); see also Betsy J. Grey, *The Future of Emotional Harm*, 83 FORDHAM L. REV. 2605, 2637–38 (2015) (noting that the DSM-5 has been “highly controversial” and that leading psychiatrists have branded the DSM-5 as a “broad overreach” by the APA).

133. Cia Bearden, *The Reality of the DSM in the Legal Arena: A Proposition for Curtailing Undesired Consequences of an Imperfect Tool*, 13 HOUS. J. HEALTH L. & POL’Y 79 (2012) (setting forth numerous critiques of the DSM).

assessment tools “reinforce similar race and ability hierarchies today.”<sup>134</sup> Thus, the DSM must also be critiqued as a seemingly “objective” assessment tool that, in fact, reinforces and codifies white supremacist beliefs about race, ability, and notions of normalcy.<sup>135</sup>

Health law scholar Matt Lamkin provides support for such a DisCrit critique by highlighting the lack of objectivity inherent in the DSM’s system of classifying mental illness.<sup>136</sup> Lamkin argues that “determining whether a difference should be considered an illness is an inherently subjective determination” that is “influenced by contemporary social expectations and prejudices.”<sup>137</sup> To illustrate his point, Lamkin notes that it was only in 1973 that the DSM removed homosexuality as a pathological “sexual deviation,” alongside sadism and necrophilia.<sup>138</sup> Similarly, Metzl illustrates how contemporary social expectation and prejudices controlled the misdiagnosis of Black civil rights protesters in the 1960s as schizophrenic.<sup>139</sup> In fact, it has even been argued that drapetomania—“the disease causing Negroes to run away”—would have “met many of the criteria for inclusion” as a mental disorder according to the DSM.<sup>140</sup> By forcing reliance on the seemingly “objective” assessment tool of the DSM, the CDC instructions help cement white supremacist beliefs about race, ability, and notions of normalcy.

### C. Dismantling Discretionary Relief: The Inadmissibility Waiver

If after the mandatory medical exam, an immigrant is deemed inadmissible based on INA § 212(a)(1)(A)(iii), she may still be eligible for a discretionary waiver of inadmissibility. The INA includes several general discretionary waivers for certain grounds of inadmissibility. Each of these waivers has different eligibility requirements and standards. For example, the standard for a waiver under INA § 212(d)(3)(A)<sup>141</sup> is

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134. Annamma et al., *supra* note 8, at 15 (noting that white supremacist beliefs about race and ability were “reified through laws, policies, and programs until these concepts became uncritically conflated and viewed as the natural order of things”).

135. *Id.* (arguing that “dis/ability and race first became equated and molded through pseudo-sciences, but later further cemented through seemingly ‘objective’ clinical assessment practices”).

136. See Matt Lamkin, *Regulating Identity: Medical Regulation as Social Control*, 2016 BYU L. REV. 501, 557–58.

137. *Id.* at 558.

138. *Id.* at 558–59.

139. See generally METZL, *supra* note 110.

140. GREENBERG, *supra* note 132, at 2.

141. INA § 212(d)(3)(A) provides a waiver for almost all inadmissibility grounds except for those pertaining to sabotage, espionage, genocide, and participation in Nazi persecution. 8 U.S.C. § 1182(d)(3)(A).

determined by weighing three factors: “[1] *the risk of harm to society if applicant is admitted*”; 2) *the seriousness of the applicant’s prior immigration law or criminal law violations if any*; and 3) *the nature of the applicant’s reasons for wishing to enter the United States.*”<sup>142</sup> As another example, the standard for a waiver under INA § 212(d)(14)<sup>143</sup> is determined by weighing three factors: 1) *the substantial intrinsic merit of the immigrant’s field of work*; 2) *whether the proposed benefit will be national in scope*; and 3) *whether the national interest would be adversely affected by denial of the waiver.*<sup>144</sup> As DisCrit reveals, these inadmissibility waivers impart broad discretionary power to immigration officers whose determinations concerning “risk of harm to society” and “national interest” are informed by white supremacist beliefs about race and ability and pseudoscience-based myths about immigrants as deviant, morally weak, emotionally unstable, dangerous, and frightening.

## CONCLUSION

Although mental health-related exclusionary immigration laws may present as a facially “neutral” set of laws—as DisCrit helps make clear—INA § 212(a)(1)(A)(iii) carries forward the white supremacist, racist, and ableist ideologies of the eugenics movement into the present. As a result, DisCrit helps broaden the conceptualization of race-based immigrant exclusion by exposing how INA § 212(a)(1)(A)(iii) reinforces white supremacist beliefs about race and ability that shape notions of citizenship and belonging. Immigration and critical race scholars can continue to use DisCrit as an exploratory analytical tool to examine the intersections of race and disability within immigration law.

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142. *In re Hranka*, 16 I. & N. Dec. 491, 492 (B.I.A. 1978) (emphasis added). The INA does not specify a standard for discretionary waivers under INA § 212(d)(3)(A), but the Board of Immigration Appeals created a balancing test of three factors. *See id.*

143. INA § 212(d)(14) provides a special inadmissibility waiver for survivor applicants for nearly all grounds of inadmissibility except those related to perpetrators and participants of Nazi persecution, genocide, acts of torture, or extrajudicial killings. 8 U.S.C. § 1182(d)(14).

144. The INA does not specify a standard for discretionary waivers under INA § 212(d)(14), but the Board of Immigration Appeals created a balancing test of three factors to determine “national interest.” *In re N.Y. Dep’t Transp.*, 22 I. & N. Dec. 215, 217 (B.I.A. 1998) (emphasis added).